



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET, SW  
ATLANTA, GEORGIA 30303-3104  
December 16, 2020

**MEMORANDUM**

**SUBJECT:** Determination that EPA's Decision to Approve or Disapprove the State of Florida's Request to Assume Administration of a Clean Water Act Section 404 Program Would Have No Adverse Effects to Essential Fish Habitat Under the Magnuson-Stevens Fishery Conservation and Management Act

**FROM:** Jeaneanne M. Gettle, Director  
Water Division

**JEANEANNE GETTLE** Digitally signed by JEANEANNE GETTLE  
Date: 2020.12.16 09:50:52 -05'00'

**TO:** FILE

This Memorandum documents that EPA's decision to approve or disapprove the State of Florida's request to assume administration of a Clean Water Act (CWA) Section 404 program would have no adverse effects to Essential Fish Habitat (EFH), pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA)

**BACKGROUND**

Section 404 of the CWA authorizes the Secretary of the Army, acting through the Chief of Engineers of the U.S. Army Corps of Engineers (Corps), to issue permits for the discharge of dredged or fill material into waters of the United States. CWA Section 404(g) allows a state or tribe to submit to EPA a request to assume administration of a Section 404 program in certain waters within the state's or tribe's jurisdiction.

On August 20, 2020, EPA received from the Governor of the State of Florida a program submission for regulating discharges of dredged or fill material into waters within the jurisdiction of the State in accordance with the CWA. EPA subsequently determined Florida's program submission to be complete and is reviewing the submission consistent with CWA Section 404 and its implementing regulations at 40 C.F.R. Part 233. EPA will complete its review and either approve or disapprove the State of Florida's request to assume administration of its Section 404 program on or before December 17, 2020.

In reviewing Florida's submission, EPA determined that it must consider MSFCMA which requires, pursuant to Section 305(b)(2), that a federal agency consult with the National Marine Fisheries Service (NMFS) if the agency determines that its activity or action may adversely affect EFH as defined by NMFS under that Act. 16 U.S.C. § 1855(b)(2). An adverse effect is "any impact that reduces the quality and/or quantity of EFH" and "may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and

other ecosystem components, if such modifications reduce the quality and/or quantity of EFH.” 50 C.F.R. § 600.910(a). Further, “[a]dverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.” *Id.*

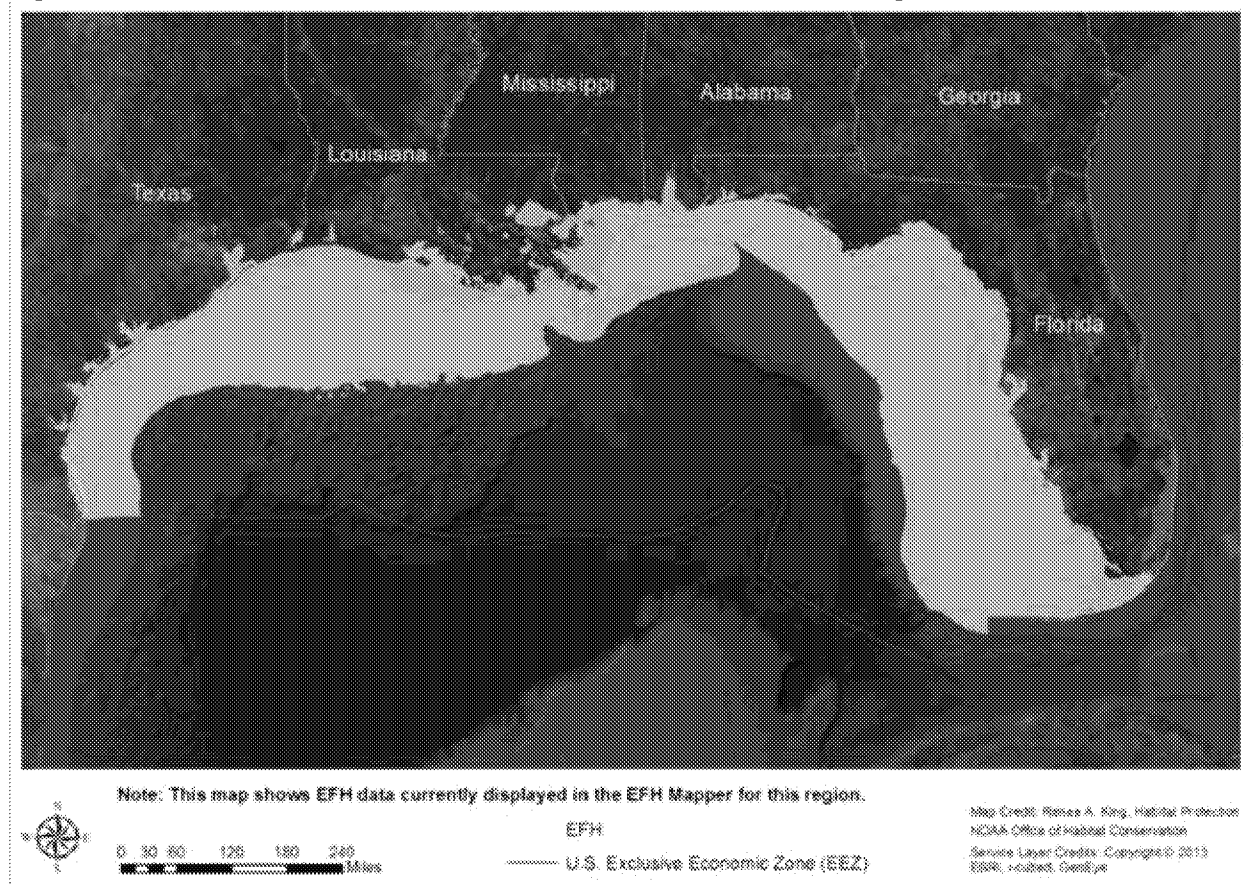
## **ASSESSMENT**

### Scope of EFH Impacted by the State of Florida’s Program

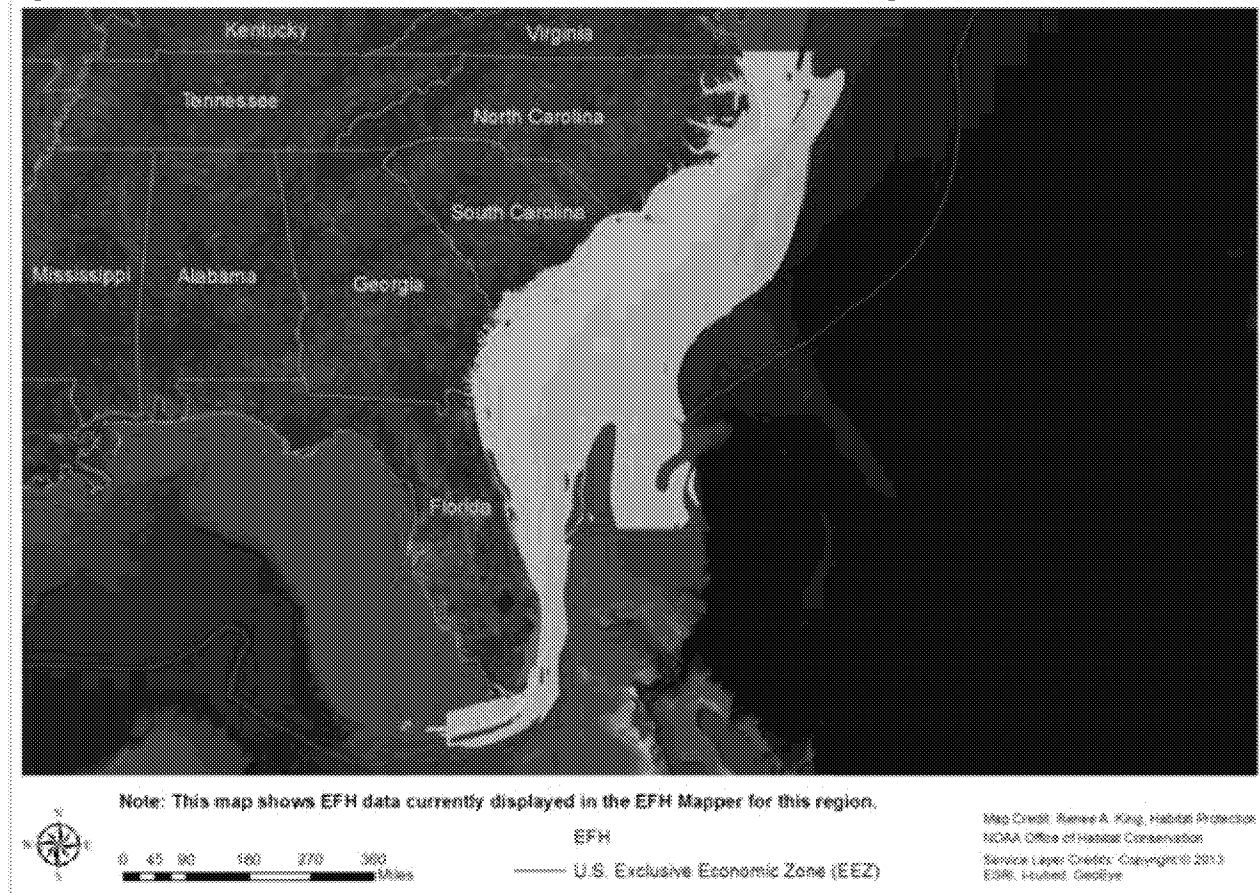
The State’s program submission does not include waters subject to the ebb and flow of the tide shoreward to their mean high-water mark, as those waters would remain under the jurisdiction of the Corps. The request by the State also does not include waters identified in the Retained Waters List (Attachment A), as such waters would also remain under the jurisdiction of the Corps. Further, the State’s request does not include wetlands adjacent to the aforementioned waters that would remain under the jurisdiction of the Corps, landward to an administrative boundary as defined in Florida’s Section 404 program regulations. In addition, the State would not administer or enforce authority over Indian country, as that term is defined in 18 U.S.C. § 1151.

NMFS maintains EFH data on its website ([www.habitat.noaa.gov/application/efhmapper/index.html](http://www.habitat.noaa.gov/application/efhmapper/index.html)). As shown in the figures below, EFH primarily exists in coastal and ocean waters including the Gulf of Mexico and the Atlantic Ocean offshore of the southeastern United States.

**Figure 1: Essential Fish Habitat in states in the Gulf of Mexico region.**



**Figure 2: Essential Fish Habitat in states in the South Atlantic region.**



Although a very small number of Florida inland waters along the coastline also include EFH, most of these inland waters are not included in the State of Florida's request to assume a Section 404 program. EPA has conducted an assessment of EFH using the mapping tool available on NMFS' website and understands that very few waters that would be assumed by the State include EFH. For example, EPA has identified the following three segments of waters that are included as part of the State's program submission and for which NMFS has identified EFH for shrimp:

- Segment of the Withlacoochee River, upstream from Inglis Dam to a location near N. Blackfoot Point;
- Suwannee River, upstream from Purvis Landing and Boat Ramp to a location near the Townsend Cemetery;
- Ochlocknee River, upstream starting 500 feet south of the ramp at Jack Langston Drive, Sopchoppy, FL, to a location near the confluence with Caney Creek.

The overwhelming majority of EFH in Florida is located in waters not included in the State of Florida's request.

## Protections for Water Quality and Fish Habitat Included in the State of Florida's Program Submission

The State of Florida's program submission includes rules adopted by the State that provide protection for water quality, human health or welfare, life stages of aquatic life and other wildlife dependent on aquatic ecosystems, and aquatic ecosystem diversity, productivity, and stability. Specifically, Chapter 62-331 of Florida's Administrative Code includes the following provisions:

- 62-331.053(3)(a)1. of Florida Administrative Code: No permit shall be issued when the project "[c]auses or contributes to violations of any applicable State water quality standard, except when temporarily within a mixing zone proposed by the applicant and approved by the Agency."
- 62-331.053(3)(a)6. of Florida Administrative Code: No permit shall be issued when the project "[c]auses or contributes to significant degradation of wetlands or other surface waters. Effects contributing to significant degradation considered individually or collectively, include:
  - i. Significant adverse effects on human health or welfare, including but not limited to, effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites;
  - ii. Significant adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their by-products outside of the project site through biological, physical, and chemical processes;
  - iii. Significant adverse effects on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or
  - iv. Significant adverse effects on recreational, aesthetic, and economic values."

As such, in those very few waters designated as EFH that are part of the State's program submission the State's authorities and rules will protect EFH from any adverse effects.

### Other Relevant Information: Statement From NMFS

On October 30, 2020, NMFS issued a letter to EPA (Attachment B) that stated the following regarding the State of Florida's request:

"We note EPA did not make an effects determination regarding EFH and recognize consultation is not required if a federal agency determines their action will not have adverse impacts on EFH. Due to the significance of the action, and in accordance with Section 305(b)(4)(A) of the Magnuson-Stevens Act and 50 CFR 600.925(b), the Habitat Conservation Division reviewed the State of Florida's application and we are not requesting EPA initiate EFH consultation nor are we offering conservation recommendations."

And that:

"Further EFH consultation on this action is not necessary unless future modifications are proposed, and you believe the resulting action may result in adverse impacts to EFH."

In addition, the letter references NMFS' concurrence with EPA's determination under Section 7 of the Endangered Species Act that EPA's decision to approve or disapprove the State of Florida's request to assume administration of a CWA Section 404 program will have no effect on endangered and threatened species under the jurisdiction of NMFS.

## **DETERMINATION**

EPA has determined, based on consideration of available information and consistent with the assessment above, the overwhelming majority of waters included in the State of Florida's program submission do not include EFH. For the very limited number of waters that include EFH and which the State of Florida could assume, the State's rules would provide protections to water quality consistent with State water quality standards and prevent significant degradation to wetlands or other surface waters, including fish and wildlife habitat, that would prevent adverse effects to EFH. NMFS' statement to EPA in its October 30, 2020 letter that it is not requesting EPA initiate EFH consultation and did not provide conservation recommendations is consistent with EPA's determination. Accordingly, EPA's decision to approve or disapprove the State of Florida's request to assume administration of a CWA Section 404 program will not have an adverse effect on EFH.

### **Attachments:**

- Retained Waters List
- Letter from NMFS to EPA dated October 30, 2020